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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1988

DUANE WENDALL LARSON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the double jeopardy and due process clauses of the Fifth Amendment to the United States Constitution guarantee a criminal defendant who is the sole defendant charged in a single, five count indictment alleging offenses on which all evidence is admissable on all other counts the right to a single trial to dispose of all charges?

II

Whether a criminal defendant whose conviction is reversed on constitutional grounds is entitled to have all records resulting from that conviction expunged?

TABLE OF CONTENTS

	Page:
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT:	
I	
THIS COURT SHOULD ADDRESS THE ISSUE OF WHETHER A CRIMINAL DEFENDANT HAS THE RIGHT TO DISPOSE OF ALL CHARGES RESULTING FROM A SINGLE CRIMINAL EPISODE, SCHEME OR PLAN IN A SINGLE TRIAL, AT LEAST ABSENT SOME COMPELLING REASON TO THE CONTRARY. THE DECISION BELOW SANCTIONS A PROCEDURE BY WHICH PETITIONER WAS NEEDLESSLY SUBJECTED TO MULTIPLE PROCEEDINGS IN VIOLATION OF THE DOUBLE JEOPARDY AND DUE PROCESS	

CLAUSES, RESULTING IN A FORCED ABANDONMENT OF PETITIONER'S RIGHT TO TRIAL BY JURY. 17

II

A CRIMINAL DEFENDANT WHOSE CONVICTION IS REVERSED ON CONSTITUTIONAL GROUNDS HAS THE RIGHT TO RELIEF FROM THE CONSTITUTIONAL VIOLATION TO THE MAXIMUM EXTENT POSSIBLE, INCLUDING EXPUNGMENT OF THE RECORDS RELATING TO THAT CONVICTION. 37

CONCLUSION 44

CERTIFICATE OF SERVICE 47

TABLE OF AUTHORITIES

CASE:	PAGE IN PETITION:
SUPREME COURT CASES	
Arizona v. Washington, 434 U.S. 497, 54 L. Ed. 2d 717, 98 S. Ct. 824	23, 24
Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970)	22
Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)	26
Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)	25
Burgett v. Texas, 389 U.S. 109, 19 L. Ed. 2d 319, 89 S. Ct. 258 (1967)	40
Department of Justice v. Julian, 42 Cr. L. 4136 (1988)	39
Carter v. Greene County, 396 U.S. 320, 24 L. Ed. 2d 549, 90 S. Ct. 518	42
Harris v. Oklahoma, 432 U.S. 682, 53 L. Ed. 2d 1054, 97 S. Ct. 2912 (1977)	22
Loper v. Beto, 405 U.S. 473, 31 L. Ed. 2d 374, 92 S. Ct. 1014 (1972)	40
Louisiana v. United States, 380 U.S. 145, 13 L. Ed. 2d 709, 85 S. Ct. 817	42

Mathews v. Morrison, 106 S. Ct. 1044, 475 U.S. ___, 89 L. Ed. 2d 187 (1986) 22

North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) 26

Oregon v. Kennedy, 456 U.S. 667, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982) 23, 24 31, 32, 35

Peters v. Hobby, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed. 1129 (1955) 41, 43

Price v. Georgia, 398 U.S. 323, 26 L. Ed. 2d 300, 90 S. Ct. 1757 23

Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 92 S. Ct. 1267 42

Tibbs v. Florida, 457 U.S. 31, 72 L. Ed. 2d 652, 102 S. Ct. 2211 23

Wade v. Hunter, 336 U.S. 684, 93 L. Ed. 974, 69 S. Ct. 834 24

United States v. Lane, 474 U.S. ___, 88 L. Ed. 2d 814, 106 S. Ct. ___ (1986) 19, 20

United States v. Tucker, 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972) 40

COURT OF APPEALS CASES

Brady v. Samaha, 667 F. 2d 224 (1st Cir. 1981) 30

Chatain v. Kelley, 510 F. 2d 1232 (D.C. Cir. 1975) 44

Diamond v. United States, 649 F. 2d 496 (7th Cir. 1981) 43

Larson v. United States, 835 F. 2d 169 (8th Cir. 1987) 2

Livingston v. United States Department of Justice, 759 F. 2d 74 (D.C. Cir. 1985) 41

McLeod v. United States, 385 F. 2d 734 (5th Cir. 1967) 43

Mauer v. Ind. And As Members of Los Angeles Cty., 691 F. 2d 434 (9th Cir. 1982) 42

Menard v. Saxbe, 498 F. 2d 1017 (D.C. Cir. 1974) 43

Paton v. La Prade, 524 F. 2d 862 (3rd Cir. 1975) 44

Tarlton v. Saxbe, 507 F. 2d 1116 (D.C. Cir. 1975) 43

Wilson v. Webster, 467 F. 2d 1282 (9th Cir. 1972) 43

United States v. Cavale, 688 F. 2d 1098 (7th Cir. 1982) 30

United States v. De Luna, 763 F. 2d 897 (8th Cir. 1985) 21

United States v. Larson, 796 F. 2d 244 (8th Cir. 1986) 13

United States v. Marchant, 774 F. 2d 888 (8th Cir. 1985), cert denied, 106 S. Ct. 1190 21

United States v. Miller, 725 F. 2d 462 (8th Cir. 1981) 20

United States v. Pack, 773 F. 2d 261 (10th Cir. 1985) 30

DISTRICT COURT CASES

Thompson v. United States Department of Transportation, 549 F. Supp. 274 (S.D. Fla. 1975) 44

STATE COURT CASES

People v. Palisamo, 464 N.E. 2d 1147 (Ill. S. Ct. 1984) 36

State v. Rowe, 480 A. 2d 778 (Me. 1984) 36

PUBLICATIONS

Note: Mistrials Arising From Prosecutorial Error: Double Jeopardy Protection, 34 Stan. L. Rev. 1061 (1982) 32

CONSTITUTIONAL PROVISIONS

Double Jeopardy Clause of the Fifth Amendment to the United States Constitution 3

Due Process Clause of the Fifth Amendment to the United States Constitution 3

STATUTES

18 U.S.C. §2 4, 5

18 U.S.C. §1001	4
18 U.S.C. §3578(b)	38
26 U.S.C. §7206(1)	4
28 U.S.C. §1254(1)	3
28 U.S.C. §1291	17
28 U.S.C. §2101(c)	2
28 U.S.C. §2255	15, 17

RULES

Supreme Court Rule 17.1(a)	18
Supreme Court Rule 17.1(c)	18, 37
Supreme Court Rule 20.2	2
Rule 8, F.R. Cr. P.	10, 18, 19
Rule 32(c)(1), F.R.Cr.P.	39, 40

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DUANE WENDALL LARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The petitioner, Duane Wendall Larson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 4, 1987, and the order of the United States Court Court of Appeals for the Eighth Circuit, entered on January 29, 1988 denying the petition for rehearing with suggestion for rehearing en banc.

OPINIONS BELOW

The opinion of the Court of Appeals, Larson v. United States, is reported at 835 F. 2d 169 (8th Cir. 1987) and is reproduced in the Appendix hereto at App. 1 through App. 10. The order of denial of rehearing and rehearing en banc, not yet reported, appears in the Appendix at App. 11. The order affirming the judgment of the District Court in accordance with the opinion of the Court of Appeals appears in the Appendix at App. 12. The opinion of the District Court, denying petitioner's Motion to Vacate Sentence appears in the Appendix at App. 13 through App. 22.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 4, 1987. A timely petition for rehearing en banc was denied on January 29, 1988. Title 28 U.S.C. §2101(c) and Supreme Court Rule

20.2 permit filing a petition for writ of certiorari in civil cases within ninety days of the entry of judgment by the Court of Appeals. This petition is timely because it was filed within that period. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The relevant constitutional provisions in this petition are the double jeopardy clause of the Fifth Amendment to the United States Constitution, which provides in relevant part that "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" and the due process clause of the Fifth Amendment to the United States Constitution, which provides that no person shall "be deprived of life, liberty or property without due process of law."

STATEMENT

This petition concerns the severance, over petitioner's objection, of three counts

of a five count indictment in which petitioner was the only defendant and the subsequent subjection of petitioner to two separate criminal proceedings to dispose of the charges in the indictment. Also presented is the question of whether a criminal defendant who has suffered an unconstitutional conviction, later reversed, has the right to the expungment of all documents relating to that conviction.

On April 10, 1985, petitioner was indicted in the United States District Court, District of Minnesota in case number 3-85-43. The indictment alleged five counts (App. 23 through App. 28). Counts I, II and III charged income tax evasion in violation of Title 26 U.S.C. §7206(1) for the years 1978, 1979 and 1980, respectively. Counts IV and V charged the making of false statements in violation of Title 18 U.S.C. §1001 and Title 18 U.S.C. §2. It was the government's theory respecting Counts IV and V that petitioner's

purchase of cashier's checks in individual amounts of less than $10,000, but with the total value purchased in a single day exceedings $10,000, constituted concealment of a material fact within the jurisdiction of a federal agency. Liability as an aider and abettor under Title 18 U.S.C. §2 was premised on the theory that petitioner's "structured transactions" caused the banks involved to fail to submit required reports on currency transactions (CTR's).

On April 15, 1985, petitioner was arraigned and pleaded not guilty. On April 16, 1985, petitioner retained attorney Raymond J. Smith of Chicago to represent him. Appropriate pretrial motions, including motions to dismiss Counts IV and V were made on April 25, 1985.

On May 31, 1985, a status conference was held. Relevant portions of the transcript of that hearing are reproduced in the Appendix hereto at App. 29 through App. 65.

The government advised the District Court that there would be a trial. The court cut off government counsel's discussion of trial preparation, saying "What about the settlement? Let's get to the settlement." (App. 29-32). When defense counsel informed the court that he expected a three or four day trial, the court informed him that it did not have three or four day trials, that the longest trials were two days and the last one had been seven hours. The court wanted to know if counsel would match the seven hour figure. (App. 32-33).

The District Court expressed the opinion that Counts IV and V would be simpler to try and that the tax counts would take more time. When government counsel again discussed trial, the court informed him that it was still interested in "settlement" (App. 33-34). The District Court made clear that its interest was in saving time (App. 35-36).

After hearing the facts concerning

petitioner's conviction and sentence for possession of cocaine (App. 35-48), the court once again suggested plea discussions and assigned a United States Probation Officer to assist in those discussions (App. 47-48). Counsel had specifically advised the court that he felt there was a legitimate defense to the tax counts because the government's starting point in its net worth case was weak (App.41).

Upon being reminded that trial was scheduled for the following week, the court once again suggested plea discussions (App. 48-49).

After more than an hour of plea discussions, assisted by the United States Probation Officer assigned by the Court, the court was informed that no agreement could be reached (App. 49-50). After some discussion of the reasons why no agreement could be reached, the court inquired as to whether the government had moved to revoke petitioner's bond (App. 53-54).

For reasons which are not apparent from the record, the court began reviewing the maximum penalties available for each count in the indictment. When government counsel informed the court that the maximum possible sentence on all counts was twenty-five years, the court stated "You stole my stuff" (App. 54-55).

After again reviewing the available penalties (App. 55-60), the court inquired as to how long it would take to try just Counts IV and V. After being advised that those counts would probably require only a day or two, the court remarked that it "would have ten years" and then repeated that Counts IV and V would only take a day or two and that the court "would have ten years". The court then suggested "segregating it" (severance of counts) (App. 58-60).

When defense counsel stated that he wished to try the entire indictment to a single jury, the court stated that Counts IV

and V could be tried to a jury, and then, "if need be", the court could "thank them very much" and try Counts I, II and III to the same jury (App. 60-61).

The court then noted that while it could sentence petitioner to another twenty-five years, it seemed all the court really needed was another ten years (App. 60-61). The court then announced that it might "segregate them" sua sponte and that a short trial was needed (App. 61-62). When defense counsel objected to two trials, the court directed both sides to file memoranda on the court's authority to sever sua sponte (App. 62-64).

Inquiring again as to the length of a trial on Counts IV and V, the court remarked that it normally did not take long to try such cases as they were "quite clear cut" (App. 64-65).

Counsel for both sides filed the memoranda ordered by the court. The government, which had not sought severance, took the

equivocal position that while the conduct involved in the various counts was so intertwined that joiner was proper under Rule 8, F.R.Cr.P., it could not be said that there was no possibility of confusion of the issues or prejudice from trying all counts together (App. 66-73). The defense memorandum opposed severance, arguing that it was appropriate to dispose of all charges in a single proceeding (App. 74-75).

On June 4, 1985, the District Court entered an order severing Counts IV and V and finding that petitioner would not be prejudiced by severance (App. 76-77). Petitioner chose to waive a jury.

Trial on Counts IV and V began on June 24, 1985. Insisting on its right to present evidence of the tax violations charged in the severed counts, the government introduced proof of the following over petitioner's objections.

Petitioner had large sums of cash as far

back as 1979 (App. 79-80) and petitioner was the subject of a criminal tax investigation (App. 82-88). For the years 1974 through 1981, petitioner had filed tax returns reporting relatively little income, but after he became aware of the criminal tax investigation petitioner filed tax returns reporting $150,000 and $124,000 respectively for the years 1981 and 1982. Neither return reported a source of income (App. 88-19).

The government introduced petitioner's tax returns for the years 1974 through 1983 to prove motive for the currency transactions, although it conceded it did not have to prove motive (App. 88-90). It also introduced a series of cashier's checks for the year 1979 showing that petitioner had funds in that year substantially in excess of his reported income, although the offenses charged in Counts IV and V related only to the year 1982 (App. 91-111). The government also showed that petitioner had used the funds represented

by the cashier's checks in 1979 to purchase coins (App. 94-111).

The government obtained an immunity order (App. 112-114) requiring Donald Leach to testify on both the CTR and the tax counts. At the trial on Counts IV and V, Leach testified to petitioner's possession of cash in 1979, three years prior to the date of the offenses charged in Counts IV and V. Finally, the government presented evidence that petitioner had substantial amounts of money in 1979 which he had not accounted for in his 1979 tax return (App. 116-117).

At the close of evidence, the District Court deliberated for about five minutes, found petitioner guilty and ordered him taken into custody. On August 1, 1985, petitioner was sentenced to terms of five years each on Counts IV and V, to be served consecutively to each other and consecutively to a previous ten year term.

A separate presentence report was com-

piled on the basis of the CTR convictions. To date, that PSI has not been ordered destroyed. On appeal, the Eighth Circuit Court of Appeals reversed petitioner's CTR convictions, finding the statute failed to give the notice required by the due process clause. United States v. Larson, 796 F. 2d 244 (8th Cir. 1986).

On August 16, 1985, petitioner filed a Motion to Bar Prosecution on Counts I-III (App. 120-122). That motion argued that the court had abused its discretion in severing Counts IV and V over petitioner's objections and that the government should not be able to proceed with a second prosecution before a new trier of fact. In its Response, the government denied that it had ever sought severance. "However, the government never sought severance orally or in brief." (App. 123).

In an order dated August 16, 1985, the District Court found that it had severed over petitioner's objections in order to prevent

prejudice to petitioner (App. 128-129).

On August 16, 1985, a status conference was held on the still pending tax counts. After noting that the currency transaction trial had taken only a day and eliciting the fact that the tax case could take three weeks, the court remarked "Then we can save three weeks of time. I assume prudence would dictate there'd be other disposition. But if you haven't disposed of it, we'd just try it." (App. 130).

Despite the fact that defense counsel had to travel to Minneapolis from Chicago, the court indicated that trial sessions would be "uneven" for at least a week or two (App. 131-132). The Clerk informed counsel that trial would be a series of half days.

In outlining its case, the government described the prospective evidence as "information somewhat similar to what the court saw in the currency transactions." (App. 132-134).

On August 19, 1985, faced with the pros-

pect of additional consecutive sentences and a trial which might drag on for considerable time and at considerable expense due to the part time trial schedule, petitioner entered a plea of guilty to Count II, Counts I and III to be dismissed at the time of sentencing.

On October 28, 1986, petitioner filed the first of two motions relevant to this petition. The first motion argued that the reversal of petitioner's convictions on Counts IV and V entitled him to expungment of the pre-sentence report in that case. On December 17, 1986, petitioner filed the second motion, pursuant to 28 U.S.C. §2255. That motion argued that the District Court's severance, over petitioner's objection, of counts of an indictment which could obviously have been tried together and petitioner's subsequent subjection to a second proceeding violated the double jeopardy clause and petitioner's due process right.

On February 27, 1987, the District Court

a single order denying both motions (App. 13-22). On March 18, 1987, petitioner filed a timely notice of appeal.

On appeal, the Eighth Circuit rejected petitioner's claim of a constitutional right to a single trial. It found that, absent a showing of clear prejudice and abuse of discretion, the District Court's decision to sever could not be disturbed. Noting that the District Court stated it had severed to prevent the [p]otential prejudice [that] arises in a case involving complex and confusing issues, such as the instant case.", the Court of Appeals found no abuse of discretion (App. 4-5).

Addressing petitioner's motion for expungment of records pertaining to Counts IV and V, the conviction for which was reversed on constitutional grounds, the Eighth Circuit found that the attachment of a notation to the presentence report stating that those convictions had been reversed was sufficient

to protect petitioner's interests. The Court of Appeals found that because the United States Parole Commission does not use convictions reversed on constitutional grounds, petitioner would not be prejudiced by the continued existance of the records reflecting the reversed convictions (App. 8-9).

The District Court's jurisdiction was founded in Title 28 U.S.C. §2255. The Court of Appeals' jurisdiction was founded in Title 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1.) THIS COURT SHOULD ADDRESS THE ISSUE OF WHETHER A CRIMINAL DEFENDANT HAS THE RIGHT TO DISPOSE OF ALL CHARGES RESULTING FROM A SINGLE CRIMINAL EPISODE, SCHEME OR PLAN IN A SINGLE TRIAL, AT LEAST ABSENT SOME COMPELLING REASON TO THE CONTRARY. THE DECISION BELOW SANCTIONS A PROCEDURE BY WHICH PETITIONER WAS NEEDLESSLY SUBJECTED TO MULTIPLE

PROCEEDINGS IN VIOLATION OF THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES, RESULTING IN THE FORCED ABANDONMENT OF PETITIONER'S RIGHT TO TRIAL BY JURY.

The issue presented here is particularly appropriate for review by this Court because of the considerations set out in Supreme Court Rule 17.1 (a) and (c). The opinion of the Court of Appeals sanctioned a proceeding in the District Court which so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory powers. In addition, it does not appear that this Court has ever directly addressed the issue of a criminal defendant's right to dispose of all charges arising from a single episode, scheme or plan in a single trial, at least absent compelling reasons for requiring multiple proceedings.

There can be little doubt that the five counts charged in the indictment in this case were properly joined under Rule 8, F.Cr. Cr.

P., which permits joinder of two or more offenses in the same indictment where the offenses are similar in character or are part of a common scheme or plan. The government conceded as much at page 2 of its memorandum of June 3, 1985 (App. 67-68) when it said that "..while the government contends that the possibility of prejudice or confusion is minimal..". It was the government's view that "the conduct related to the currency transaction violations and the tax evasion are so intertwined that joinder was proper under Rule 8 Fed. Rules Crim. Proc." (App. 67). As the government noted at page 1 of its August 14, 1985 Response to petitioner's Motion to Bar Prosecution, "However, the government never sought severance orally or in brief." (App. 123).

There is not only a strong preference for single trials where all counts can be joined without prejudice, it is the norm, the rule. United States v. Lane, 474 U.S. ___,

88 L. Ed. 2d 814, 825, 106 S. Ct. ___ (1986); United States v. Miller, 725 F. 2d 462, 467 (8th Cir. 1981). Joinder is proper where all evidence on one count would be admissable on the other counts. United States v. Lane, supra, 88 L. Ed. 2d at 826.

The evidence directly related to Counts IV and V consisted of testimony and documents which showed that petitioner had, on two separate occassions in 1982, gone to different branches of the same bank and purchased cashier's checks totalling more than $10,000 from each bank on the same day. It was the government's theory that from 1978 to 1982 petitioner had engaged in the concealment of income resulting in the five counts in the indictment. It was the government's theory that the purchases of cashier's checks were intended to avoid records of the funds involved in petitioner's own bank accounts, and to conceal the source of the funds (App. 78-82, App. 88-91).

Because the government contended that petitioner's 1982 cash transactions were for the purpose of concealing income, it was permitted to introduce at trial on the CTR counts evidence relating to petitioner's tax returns for the years 1978-1980, the years charged in Counts I-III. The District Court permitted this evidence as proof of motive (App. 88-91). This evidence would have been equally admissable as proof of a common scheme or plan. United States v. Marchant, 774 F. 2d 888, 893 (8th Cir. 1985) cert denied, 106 S. Ct. 1190. Had there been a single trial, the evidence of the currency transactions would clearly have been admissable on the tax counts to prove a commont scheme or plan. Id.; United States v. De Luna, 763 F. 2d 897, 912-13 (8th Cir. 1985).

While this Court has never squarely addressed the right of a criminal defendant to dispose of all charges arising from a single episode, scheme or plan in a single

trial, at least absent come compelling reason to the contrary, members of the Court have suggested that such a right exists. Ashe v. Swenson, 397 U.S. 436, 445-47, 25 L. Ed. 2d 469, 476-77, 90 S. Ct. 1189 (1970) (Brennan, J., concurring); Harris v. Oklahoma, 432 U.S. 682, 683, 53 L. Ed. 2d 1054, 1056, 97 S. Ct. 2912 (1977) (Brennan, J., concurring); Mathews v. Morrison, 106 S. Ct. at 1044, 475 U.S. ___, 89 L. Ed. 2d 187 (1986) (Brennan, J., dissenting, adhering to the view that all charges growing out of a single episode, plan or scheme must be prosecuted in a single proceeding).

The Court should find a right to dispose of all charges arising from a single scheme or plan, at least absent compelling reasons to the contrary, because the double jeopardy clause is designed to do more than merely prevent multiple punishments for the same offense. It is intended to prevent the government, with all its resources, from harrassing and wearing

down a criminal defendant by financially and emotionally draining him. Tibbs v. Florida, 457 U.S. 31, 41, 72 L. Ed. 2d 652, 661, 102 S. Ct. 2211; Arizona v. Washington, 434 U.S. 497, 508, 54 L. Ed. 2d 717, 730-31, 98 S. Ct. 824; United States v. Dinitz, 424 U.S. 600, 611, 47 L. Ed. 2d 267, 97 S. Ct. 1075; Price v. Georgia, 398 U.S. 323, 326, 26 L. Ed. 2d 300, 303, 90 S. Ct. 1757.

The double jeopardy clause is every bit as much intended to prevent judicial over-reaching, that is, conduct designed to avoid an acquittal or subvert the right to a single trial, as it is to prevent government over-reaching. Oregon v. Kennedy, 456 U.S. 667, 680, 72 L. Ed. 2d 416, 427, 102 S. Ct. 2083) (Powell, J., concurring); Arizona v. Washington, supra, 434 U.S. at 508, 54 L. Ed. 2d at 730, 98 S. Ct. 824.

Only a high degree of necessity, often referred to as "manifest necessity", justifies the imposition of multiple trials where one

trial would do. Oregon v. Kennedy, supra, 456 U.S. at 683, 72 L. Ed. 2d at 429-30, 102 S. Ct. 2089, n. 9 and n. 10 (1982); Arizona v. Washington, supra, 434 U.S. at 505, 54 L. Ed. 2d at 717, 98 S. Ct. 824.

Manifest necessity has meant many things over the years. It might mean an advancing army. Wade v. Hunter, 336 U.S. 684, 93 L. Ed. 974, 69 S. Ct. 834. It has meant the introduction of improper testimony so prejudicial it could not be cured by proper instruction. Oregon v. Kennedy, supra. It has meant a deadlocked jury. Arizona v. Washington, supra. It has meant a judge or juror having a heart attack and it has meant unauthorized contact with the jury. It has also meant the trial judge has been indicted or a key witness has been killed on the way to testify. It has never meant a District Court's arbitrary limitation of trials to two days. Given the lack of any codefendants and the complete cross admissability of all evidence on all

counts, there was clearly no manifest necessity for more than one trial in this case.

The facts in this case also implicate the due process clause. Due process requires that petitioner not be treated any differently from other criminal defendants in similar circumstances. Because the District Court had predetermined what it considered the appropriate result in this case in advance, right down to the sentence to be imposed, it clearly treated petitioner differently from the manner in which it would have treated other defendants in similar circumstances. The result was that petitioner was put through the financially and emotionally exhausting experience of a proliferation of proceedings where only one trial was necessary, whatever the verdict might have turned out to be.

Certainly it violates due process to punish a criminal defendant for doing what the law plainly allows him to do. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct.

663, 668, 54 L. Ed. 2d 604 (1978); North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974). In North Carolina v. Pearce, supra, 395 U.S. at 725, 89 S. Ct. at 2080, this Court held that "due process requires that a defendant be freed of the apprehension of such retaliatory motivation on the part of the sentencing judge." It if violates due process to punish a criminal defendant for exercising his rights, certainly it also violates due process to threaten a defendant to dissuade him from exercising his rights.

The record in this case clearly demonstrates both an intent by the trial court to subvert petitioner's right to a single trial, with the possibility of acquittal on the tax charges due to a poor starting point in the government's net worth case, and to let petitioner know that if he chose to exercise his right to a trial by jury on the income tax

counts, the penalty for doing so was potentially staggering.

An examination of the record reveals that the trial court knew that petitioner and his counsel considered the income tax case to be weak because it was a net worth case in which the required starting point was subject to serious challenge (App. 41).

The trial court had assumed that petitioner was guilty of something by the time of the first status conference, noting it would not take long to try Counts IV and V and that such cases were "quite clear cut" (App. 64). The trial court had already made up its mind that ten years, consecutive to petitioner's prior sentence, was the appropriate sentence, although the record does not reveal how it had come to that conclusion prior to hearing any evidence (App. 59-60).

Having been put on notice several times during the relatively brief proceeding that petitioner did not wish to enter a plea (App.

30-32; App. 41-42; App. 48-49), the District Court could not have made it more plain that it did not want a trial and expected a plea. It did so by repeatedly turning aside discussion of a trial and referring to a "settlement" (App. 30-34), going so far as to assign a United States Probation Officer to assist in plea negotiations (App. 47-51). Finally, the District Court made it plain that if petitioner persisted in exercising his right to a trial, he might expect a substantially more severe sentence than the ten years the court was offering for a "settlement" (App. 54-57; App. 60-61).

The District Court made it quite plain that it had no desire to permit petitioner the time required for his constitutionally guaranteed right to a jury trial by noting that the longest trials it had were two days, after which, as an apparent after thought, the court inquired as to what petitioner was charged with (App. 32-33).

Having been put on notice that petitioner wished to dispose of all charges in a single jury trial, the trial court proceeded to sever, over petitioner's objections (App. 60-64). It first explained that it had done so not to prevent prejudice, there being no prejudice to prevent, but because petitioner would not be prejudiced by severance (Order of June 4, 1985, App. 76-77), later changing its explanation to that of having severed in order to prevent prejudice to petitioner (App. 128-129, Order of August 16, 1985).

Little time was actually spent discussing the issue of severance. The May 31, 1985 hearing lasted only one hour, fifty-four minutes. One hour sixteen minutes of that time was spent in court directed plea negotiations with the United States Probation Officer.[1/]

1/The Court of Appeals' opinion states that the District Court severed the charges to prevent "potential prejudice (that) arises in a complex case involving complex and confusing issues, such as the instant case." In fact, the district court made no such finding of complexity. This quotation is from the

The trial court's finding that severance was required to prevent prejudice to petitioner is contradicted not only by the case law on this point, but is totally inconsistent with its own suggestion that both cases could be tried seriatim by the same jury. Its motivation is shown by its statment that "We could pick the same jury and try Counts

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7/ Cont'd: Government's Memorandum on Severance (App. 69). The government relied on United States v. Cavale, 688 F. 2d 1098, 1107 (7th Cir. 1982). Cavale involved seventy-two counts and ten defendants, yet Cavale was not complex enough to require severance. Apparently, the District Court found the issues to be simple enough that it proposed to use the same jury for both trials (App. 60-61). In fact, its after the fact order found that it had ordered severance because petitioner would not be prejudiced by severance.

The lack of time devoted to serious consideration of the severance issue demonstrates a lack of concern for constitutional protections. Brady v. Samaha, 667 F. 2d 224, 229 (1st Cir. 1981). As shown by Cavale, supra, and United States v. Pack, 773 F. 2d 261, 263 (10th Cir. 1985) (three counts of tax evastion, three counts of CTR violations, an overall conspiracy count, two defendants and over two hundred exhibits), cases of far greater complexity are routinely handled by juries without any need for severance being found by the courts.

Counts IV and V, and thank them very much, and then go ahead, if the need be, and try Counts I, II and III. It seems to me that all I need, in view of the ten years that he's already received from Judge Murphy is another ten years." (App. 60-61).

This statement reflects the District Court's determination to subvert petitioner's right to a single trial- and perhaps an acquittal - in order to be sure of being able to impose the additional term of ten years it had predetermined to be appropriate. Such subversion by the court is impermissible. Oregon v. Kennedy, supra, 456 U.S. 667, 72 L. Ed. 2d at 429-30 and n. 13.

Even after petitioner had been convicted on Counts IV and V, the District Court continued to let it be known that petitioner's insistence on his right to a trial on the tax charges would carry a heavy penalty. At the status conference on those charges on August 16, 1985, the District Court noted that the

trial on Counts IV and V had taken only one day. Eliciting from counsel that the trial on the remaining tax counts could take three weeks, the District Court then remarked "Then we saved three weeks of time. I assume prudence would dictate there'd be another disposition. But, if you haven't disposed of it, we'd just try it." (App. 130-131). The court then went on to make it known that if petitioner insisted on his right to trial, it would be a long, expensive process with counsel having to come to Minneapolis from Chicago because the court's schedule would be "uneven" for at least a week or two (App. 131-132).

One of the purposes of the double jeopardy clause, recognized in Orgeon v. Kennedy, supra, 72 L. Ed. 2d at 429 and other cases, is to permit the defendant to retain some degree of control over the course of the trial and the question of whether he will be subjected to multiple proceedings. See Note, Mistrials Arising From Prosecutorial Error:

Double Jeopardy Protection, 34 Stan. L. Rev. 1061 (1982) (arguing for prohibition of re-trials based on prosecutorial error unless the defendant consents to the mistrial). After the forced severance, CTR convictions and warnings about a maximum sentence following a lengthy, sporadic and expensive trial, in half day sessions, petitioner was financially and emotionally drained. After a week end in the county jail drunk tank (petitioner having been remanded after the CTR conviction and brought to the county jail for trial the preceeding Friday), on August 19, 1985 petitioner could face no more and agreed to the government's plea offer.

The prejudice to petitioner in this case is extensive and rather obvious. Petitioner was faced with a choice of pleading guilty to at least one tax count or risking the clearly stated threat of a substantially increased sentence. In order to assume the risk of that severely increased sentence, petitioner would

have had to undertake the financial and emotional burdens of a second trial, including the extremely expensive prospect of counsel having to fly in from Chicago for a day of trial here and a half-day of trial there. Unwilling to risk a substantially increased sentence and unable to bear the financial and emotional burdens of a second trial, petitioner was forced to forego his constitutional right to a trial by jury on the tax charges.

The record discussed above clearly demonstrates that, before a single word of evidence was heard - indeed, before the trial court knew what petitioner was charged with - it had already decided not only that petitioner was guilty of something, but also what the appropriate sentence was. The District Court left no doubt that petitioner was going to be convicted of something, even if it took two trials to do it. The message was clear that if petitioner persisted in demanding his right to a trial he took the serious risk of

a twenty-five year sentence instead of the ten year sentence the court made plain it would impose if petitioner did as the court wanted.

Because the double jeopardy clause is designed to protect a criminal defendant not only from prosecutorial overreaching, but also from the judicial overreaching so evident in the record, petitioner's income tax conviction should be vacated. It is no more proper for a District Court to compel a criminal defendant to undergo two trials for offenses arising from a single scheme or plan and easily triable in a single proceeding than it would be for the government to do so.

In affirming the District Court, the Court of Appeals relied on the Blockburger test, finding that tax evasion and currency transaction offenses are not the "same" under the double jeopardy clause. Petitioner, of course, had never claimed that they were. Oregon v. Kennedy, supra, supra, 72 L. Ed. 2d

at 432, n. 22 teaches that the double jeopardy clause also protects against instances such as this one where the District Court deliberately sought to overreach petitioner in order to assure the desired result, an additional ten year sentence. As then Justice Rehnquist phrased it, double jeopardy protection can rest on "balancing and fairness", not just the "bright line distinctions" of the Blockburger test.

While there is little federal law to date on this narrow area of judicial overreaching, at least two states have found such judicial conduct to violate the double jeopardy clause. See State v. Rowe, 480 A. 2d 778 (Me. 1984); and, People v. Palisamo, 464 N.E. 2d 1147 (Ill. S. Ct. 1984).

In addition to double jeopardy concerns, the District Court's conduct in predetermining not only petitioner's guilt, but also his sentence, before a trial date was even scheduled, along with the court's willingness to multiply

the proceedings to assure the predetermined result raises serious questions of due process. The Court should grant certiorari on the first question presented in order to prevent similar abuse in the future.

2.) A CRIMINAL DEFENDANT WHOSE CONVICTION IS REVERSED ON CONSTITUIONAL GROUNDS HAS THE RIGHT TO RELIEF FROM THE CONSTITUTIONAL VIOLATION TO THE MAXIMUM EXTENT POSSIBLE, INCLUDING EXPUNGMENT OF THE RECORDS RELATING TO THAT CONVICTION.

This question is appropriate for review by this Court under the provisions of Supreme Court Rule 17.1(c) because this Court has not directly addressed the question of just what relief is due a criminal defendant who has been convicted in violation of the United States Constitution.

The District Court found that petitioner could not show harm from the continued existance of the record of his unconstitutional

conviction (Order of February 26, 1987, p. 5; App. 20-21).

The Court of Appeals found that a notation on the records pertaining to the conviction that the conviction had been reversed was adequate to protect petitioner from any harm because the United States Parole Commission would not use a reversed conviction to lower his salent factor score (App. 8-9).

There are two separate considerations in this issue regarding the recall and destruction of the presentence report compiled as a result of petitioner's unconstitutional conviction on Counts IV and V. (The presentence report is the primary document in issue because petitioner's F.B.I. "rap sheet" will automatically be corrected as a result of Title 18 U.S.C. §3578(b), which requires a record of the reversal to be transmitted to the F.B.I.) The first consideration might be called statutory. That is, under the

terms of Rule 32(c)(1), F.R.Cr.P., a presentence report may not be disclosed to anyone unless the defendant has been convicted of an offense. The second consideration is constitutional.

Under the provisions of Rule 32(c)(1), F.R.Cr.P., had petitioner not been convicted, the presentence report compiled specifically as a result of that unconstitutional conviction could not have been disseminated at all. It would be anomolous to hold that the report can become a permanent part of the record on petitioner maintained by several government agencies as the result of a conviction which has now been determined to be unconstitutional.

This Court recently heard argument in Department of Justice v. Julian, 42 Cr. L. 4136 (January 27, 1988), a case which could result in presentence reports becoming available under the Freedom of Information Act. Should this Court held that presentence reports are so available, destruction of the

presentence report in this case would become even more necessary to protect petitioner from the effects of an unconstituional conviction. Congress obviously did not intend for presentence reports to be available where a defendant was not properly convicted of the offense for which the report was compiled or it would not have provided in Rule 32(c)(1) that the report could not be released unless the defendant was convicted.

Courts have often and consistently recognized that invalid convictions are invalid ab initio, and therefore may not be used for other purposes. Thus, this Court has held that an invalid conviction may not be used to enhance punishment. United States v. Tucker, 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972). Nor may an unconstituional conviction be used to impeach a defendant at trial. Loper v. Beto, 405 U.S. 473, 31 L. Ed. 2d 374, 92 S. Ct. 1014 (1972), or to support a charge of being an habitual criminal. Burgett

v. Texas, 389 U.S. 109, 19 L. Ed. 2d 319, 89 S. Ct. 258 (1967). Petitioner respectfully submits that there is no more reason to permit an unconstitutional conviction to serve as the justification for compiling and distributing a presentence report, which often reflects no more than hearsay and gossip, than there is to permit the use of unconstitutional convictions for other purposes which have already been prohibited by the courts.

Turning to the constitutional aspects of this issue, neither the District Court nor the Court of Appeals directly addressed the issue of their authority to order expungment. It is clear, however, that federal courts have substantial equitable powers and that those powers may, in appropriate cases, be exercised to order the expungment of records. Peters v. Hobby, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed. 1129 (1955); Livingston v. United States Department of Justice,

759 F. 2d 74, 78 (D.C. Cir. 1985); Mauer v. Ind. And-As Members of Los Angeles Cty., 691 F. 2d 434, 437 (9th Cir. 1982).

The real question is not whether the court has the power to order expungment, but whether it is appropriate to do so. It is beyond dispute that the documents sought to be expunged is the result of an unconstitutional conviction.

This Court has consistently held that, once a constitutional violation has been established, the courts have not only the power, but also the duty, to fashion a remedy which will, to the maximum extent possible, erase all vestiges of the constitional violation. Carter v. Greene County, 396 U.S. 320, 340, 24 L. Ed. 2d 549, 563, 90 S. Ct. 518; Louisiana v. United States, 380 U.S. 145, 154, 13 L. Ed. 2d 709, 715, 85 S. Ct. 817; Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 15-16, 92 S. Ct. 1267, 1276.

While the Court has never addressed the

issue, some courts have found that no showing of particular prejudice is required in order to justify an order for expungment, that the constitutional violation itself is sufficient justification for expunging the pertinent records. Diamond v. United States, 649 F. 2d 496, 499 (7th Cir. 1981); McLeod v. United States, 385 F. 2d 734, 749 (5th Cir. 1967); Tarlton v. Saxbe, 507 F. 2d 1116, 1120 n. 2 (D.C. Cir. 1975), citing Peters v. Hobby, supra, 349 U.S. 331, 75 S. Ct. 390, 99 L. Ed. 1129 (1955).

Other courts have found that the mere existance of records reflecting unconstitutional arrests or convictions is sufficient to raise the prospect of future harm, so that no showing of particularized harm is required. Menard v. Saxbe, 498 F. 2d 1017, 1023 (D.C. Cir. 1974); Tarlton v. Saxbe, supra, 507 F. 2d at 1120, n.1 and n.2; Wilson v. Webster, 467 F. 2d 1282, 1283-84 (9th Cir. 1972).

Several courts have suggested that in considering an order for expungment, it is particularly appropriate to consider the manner in which the material in question was acquired. Thompson v. United States Department of Transportation, 549 F. Supp. 274, 282 (S.D. Fla. 1982); Chatain v. Kelley, 510 F. 2d 1232, 1235 (D.C. Cir. 1975); Paton v. La Prade, 524 F. 2d 862, 869 (3rd Cir. 1975).

Because petitioner's conviction on Counts IV and V was obtained in violation of the Constitution, petitioner is entitled to expungment of all records resulting from that conviction. The Court should, therefore, grant certiorari on petitioner's second question in order to clarify the law regarding the relief available to one about whom records have been compiled as the result of a constitutional violation.

CONCLUSION

The double jeopardy clause is intended

to do more than merely protect a criminal defendant from being punished twice for the same offense. It is also intended to prevent the government from emotionally and financially draining the defendant through repeated trials. The Court should, therefore, grant certiorari on petitioner's first question to address the issue of whether a criminal defendant has the right, at least absent some compelling reason to the contrary, to dispose of all charges arising from a single episode, scheme or plan in a single trial. Because the record in this case persuasively demonstrates that the trial court had prejudged the case and predetermined not only petitioner's guilt, but even the appropriate sentence, the Court should at the same time consider the issue of whether the procedure employed by the District Court to assure petitioner's conviction violated the due process clause because it clearly threatened petitioner if he exercised rights guaranteed

to him by the Constitution.

The continued existance of records reflecting petitioner's unconstitutional conviction on Counts IV and V serve to perpetuate that constitutional violation. Because this Court has never addressed the question of just what relief is available to one who has been unconstitutionally convicted and faces the possibility of future harm from the continued existance of records resulting from that conviction, the Court should grant certiorari to consider petitioner's second question.

DATED this _____ day of _____, 1988.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari, together with Appendices, on counsel for the opposing party by depositing same in the United States mail, with postage prepaid, addressed to:

Office of the Solicitor General
United States Department of Justice
Washington, D. C. 20530

DATED this _____ day of April, 1988.

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